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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: SAN FRANCISCO Date: JAN 27 2010

MSC 06 091 15073

IN RE: Applicant: [redacted]

APPLICATION: Application for Status as a Temporary Resident pursuant to Section 245A of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1255a

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. If your appeal was dismissed or rejected, all documents have been returned to the National Benefits Center. You no longer have a case pending before this office, and you are not entitled to file a motion to reopen or reconsider your case. If your appeal was sustained or remanded for further action, you will be contacted.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, San Francisco, California denied the Form I-687, Application for Status as a Temporary Resident Under Section 245A of the Immigration and Nationality Act, filed pursuant to the terms of the settlement agreements reached in *Catholic Social Services, Inc., et al., v. Ridge, et al.,* CIV. NO. S-86-1343-LKK (E.D. Cal.) January 23, 2004, or *Felicity Mary Newman, et al., v. United States Immigration and Citizenship Services, et al.,* CIV. NO. 87-4757-WDK (C.D. Cal.) February 17, 2004, (CSS/Newman Settlement Agreements). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director determined that the applicant failed to provide sufficient documentation that as of January 1, 1982, the Government was aware of his unlawful status. The director also stated that the applicant failed to provide sufficient documentation to substantiate his claim of continuous resided in the United States for the duration of the requisite period. Finally, the director determined that the applicant was inadmissible.

On appeal, counsel asserts that the applicant entered the United States with a B-2 visa on September 2, 1981, and has resided continuously in an unlawful status during the requisite period. Counsel asserts that documentation was provided to substantiate the applicant's claim. The applicant provided copies of previously submitted evidence. The AAO has reviewed all of the evidence and has made a *de novo* decision based on the record and the AAO's assessment of the credibility, relevance and probative value of the evidence.[1]

Preliminarily, the AAO notes that the director adjudicated the application on the merits and presumptively found the applicant eligible for class membership under the terms of the CSS/Newman Settlement Agreements. On September 9, 2008 the court approved a Stipulation of Settlement in the class action *Northwest Immigrant Rights Project, et al vs. USCIS, et al,* 88-CV-00379 JLR (W.D. Was.) (NWIRP). Class members are defined, in relevant part, as:

> 1. Class Members [include] all persons who entered the United States in a nonimmigrant status prior to January 1, 1982, who are otherwise *prima facie* eligible for legalization under § 245A of the INA [Immigration & Nationality Act], 8 U.S.C. § 1255a, who are within one or more of the Enumerated Categories described below in paragraph 2, and who –
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> (A) between May 5, 1987 and May 4, 1988, attempted to file a complete application for legalization under § 245A of the INA and fees to an Immigration and Naturalization Service (INS) officer or agent acting on behalf of the INS,

[1] The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB,* 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS,* 891 F.2d 997, 1002 n.9 (2d Cir. 1989).

including a Qualified Designated Agency (QDE), and whose applications were rejected for filing (hereinafter referred to as 'Subclass A members'); or

(B) between May 5, 1987 and May 4, 1988, attempted to apply for legalization with an INS officer, or agent acting on behalf of the INS, including a QDE, under § 245A of the INA, but were advised that they were ineligible for legalization, or were refused legalization application forms, and for whom such information, or inability to obtain the required application forms, was a substantial cause of their failure to file or complete a timely written application (hereinafter referred to as 'Sub-class B' members); or

2. Enumerated Categories

(1) Persons who violated the terms of their nonimmigrant status prior to January 1, 1982 in a manner known to the government because documentation or the absence thereof (including, but not limited to, the absence of quarterly or annual address reports required on or before December 31, 1981) existed in the records of one or more government agencies which, taken as a whole, warrants a finding that the applicant was in an unlawful status prior to January 1, 1982, in a manner known to the government.

(2) Persons who violated the terms of their nonimmigrant visas before January 1, 1982, for whom INS/DHS records for the relevant period (including required school and employer reports of status violations) are not contained in the alien's A-file, and who are unable to meet the requirements of 8 C.F.R. §§ 245a.1(d) and 245a.2(d) without such records.

(3) Persons whose facially valid 'lawful status' on or after January 1, 1982 was obtained by fraud or mistake, whether such 'lawful status' was the result of
   (a) reinstatement to nonimmigrant status;
   (b) **change of nonimmigrant status pursuant to INA § 248;**
   (c) adjustment of status pursuant to INA § 245; or
   (d) grant of some other immigration benefit deemed to interrupt the continuous unlawful residence or continuous physical presence requirements of INA § 245A.

NWIRP further provides that CSS/Newman Settlement Agreement legalization applications pending as of the date of the agreement shall be adjudicated in accordance with the adjudications standards described in paragraph 8B of the settlement agreement. Under those standards, the applicant must make a *prima facie* showing that after his lawful entry and prior to January 1, 1982, the applicant violated the terms of his nonimmigrant status in a manner known to the

government in that, for example, documents and/or the absence of required documents (including, but not limited to, the absence of quarterly or annual address reports required on or before December 31, 1981) within the records of one or more government agencies, when taken as a whole, warrant a finding that the applicant was in an unlawful status prior to January 1, 1982 in a manner known to the government. Once the applicant makes such a showing, U.S. Citizenship and Immigration Services (USCIS) then has the burden of coming forward with proof to rebut the evidence that the applicant violated his or her status. If USCIS fails to carry this burden, the settlement agreement stipulates at paragraph 8B that it will be found that the applicant's unlawful status was known to the government as of January 1, 1982.

Thus, when an NWIRP class member demonstrates that he was present in the United States in nonimmigrant status prior to 1982, the absence from his record of a required address update due prior to January 1, 1982 is sufficient to demonstrate that he had violated his nonimmigrant status and was in unlawful status in a manner that was known to the government prior to January 1, 1982. *See* NWIRP settlement agreement, paragraph 8B. *See also*: section 265(a) of the Act as in place through December 29, 1981 (which indicates that nonimmigrants must notify the U.S. government in writing of a change of address within 10 days of the address change and must report their addresses at the end of each three-month period after entering, regardless of whether there is any address change.)

Based on his own affidavit, the applicant asserts that he was issued a B1/B2 visa from the U.S. Embassy in Manila sometime in July 1981. He states that he entered the United States through the San Francisco International Airport on September 2, 1981, and lived with relatives throughout the requisite period. In the Notice of Decision, the director determined that the applicant did not provide sufficient evidence to substantiate his claim. In support of the applicant's claim, the record contains affidavits from [redacted] and [redacted] both of whom stated that they picked up the applicant at the San Francisco International Airport on September 2, 1981. The record contains an affidavit from [redacted] that indicates that he flew on the same flight as the applicant and they both arrived at the San Francisco International Airport on September 2, 1981. The above affiants state that the applicant resided with them for a brief period of time. The record also contains an affidavit from [redacted] who stated that the applicant called her in September 1981 when he arrived in the United States. Upon review, the AAO finds that, individually and together, the statement of the applicant and his affiants indicate that their assertions are probably true. The affidavits provide sufficient details to corroborate each other's statements and the statements are consistent with the applicant's Form I-687. Therefore, the applicant has established his lawful entry into the United States before January 1, 1982.

Where an applicant entered the United States in nonimmigrant status before January 1, 1982, in order to show unlawful residence throughout the requisite period, he must establish that his period of authorized stay expired prior to January 1, 1982 through the passage of time or that he fell into unlawful status and his unlawful status became known to the government prior to January 1, 1982. *See* section 245A(a)(2)(B) of the Act.

Based on the above affidavits and the applicant's Form I-687, the applicant resided at one address for the month of September 1981 and then moved to another residence from October 1981 through October 1982. There are no address reports in the record. The record indicates that the applicant violated his nonimmigrant status in a manner known to the government when he failed to notify the U.S. government in writing of his change of address within 10 days of the address change and he failed to file the required quarterly address registration three months after his September 1981 entry. Thus, the applicant violated his lawful status in a manner that was known to the government prior to January 1, 1982.

Under the CSS/Newman Settlement Agreements, USCIS shall adjudicate each Form I-687 under the provisions of section 245A of the Act, regulations and administrative and judicial precedents which the Immigration and Naturalization Service (INS), now USCIS, followed in adjudicating the Forms I-687 timely filed during the Immigration Reform and Control Act of 1986 (IRCA) application period. *See* CSS/Newman Settlement Agreements.

For purposes of establishing residence and presence as defined at 8 C.F.R. § 245a.2(b), the term "until the date of filing" shall mean until the date the alien was "front-desked" or discouraged from filing the Form I-687 consistent with the definition of the CSS/Newman class membership. *See id.*

An applicant who files for temporary resident status pursuant to the CSS/Newman Settlement Agreements must establish entry into the United States before January 1, 1982 and continuous residence in the United States in an unlawful status since such date through the date of filing the Form I-687 during the original application period or through the date that the applicant attempted to file but was dissuaded from doing so by an agent of the INS. *See id.* and § 245A(a)(2)(A) of the Act.

An alien who applies for temporary resident status under the CSS/Newman Settlement Agreements has the burden to establish by a preponderance of the evidence that he or she has resided in the United States for the requisite periods, is admissible to the United States under the provisions of Section 245A of the Act, and is otherwise eligible for adjustment of status. *See* CSS/Newman Settlement Agreements and § 245A(a) of the Act.

The regulation at 8 C.F.R. § 245a.2(b) provides in pertinent part:

> (b) Eligibility. The following categories of aliens, who are otherwise eligible to apply for legalization, may file for adjustment to temporary residence status:
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> . . .
>
> (9) An alien who would be otherwise eligible for legalization and who was present in the United States in an unlawful status prior to January 1, 1982, and reentered the United States as a nonimmigrant, such entry being

> documented on Service Form I-94, Arrival-Departure Record, in order to return to an unrelinquished unlawful residence.
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> (10) An alien described in paragraph (b)(9) of this section must receive a waiver of the excludable charge 212(a)(19) as an alien who entered the United States by fraud.

The ground of excludability at section 212(a)(19) of the Act has been replaced by the ground of inadmissibility listed at section 212(a)(6)(C)(i) of the Act, as amended.

Section 212(a)(6)(C) of the Act provides in pertinent part:

> Misrepresentation. – (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

The inference to be drawn from the documentation provided shall depend on the extent of the documentation, its credibility and amenability to verification. 8 C.F.R. § 245a.2(d)(5).

Failure to provide evidence other than affidavits shall not be USCIS' sole basis for finding that an applicant failed to meet the continuous residence requirement. *See* CSS/Newman Settlement Agreements. In evaluating the sufficiency of the applicant's proof of residence, [USCIS] shall take into account the passage of time and other related difficulties in obtaining documents that corroborate unlawful residence during the requisite periods. *See id.*

Although the regulations provide an illustrative list of contemporaneous documents that an applicant may submit, the list also permits the submission of affidavits and any other relevant document. *See* 8 C.F.R. § 245a.2(d)(3)(vi)(L).

The application and other statements of the applicant, both oral and written, are evidence to be considered. *See Matter of E-M-,* 20 I&N Dec. 77 at 79. The applicant's statements must not be the applicant's only evidence used to establish eligibility, but they should be viewed as valid evidence. *Id.*

The absence of contemporaneous evidence is not necessarily fatal to the applicant's claim of continuous residence in the United States during the statutory period. *See id.* at 82-83. Affidavits that are consistent and verifiable may be sufficient to demonstrate continuous residence. *See id.*

Documentary evidence may be in the format prescribed by USCIS regulations. *See id.* at 80. For example, 8 C.F.R. § 245a.2(d)(3)(i) states that a letter from an employer should be signed by the employer under penalty of perjury and "state the employer's willingness to come forward and give testimony if requested." *Id.* Letters from employers that do not comply with such

requirements do not have to be accorded as much weight as letters that do comply. *Id.* However, even if not in compliance with this regulation, a letter from an employer should be considered as a "relevant document" under 8 C.F.R. § 245a.2(d)(3)(iv)(L). *Id.* Also, affidavits that have been properly attested to may be given more weight than a letter or statement. *Id.* Nonetheless in determining the weight of a statement, it should be examined first to determine upon what basis it was made and whether the statement is internally consistent, plausible and credible. *Id.* What is most important is whether the statement is consistent with the other evidence in the record. *Id.*

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Id.* at 79-80. In evaluating the evidence, *Matter of E-M-* also states that "[t]ruth is to be determined not by the quantity of evidence alone but by its quality." *Id.* at 80. Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner or applicant submits relevant, probative, and credible evidence that leads the director to believe that the claim is "probably true" or "more likely than not," the applicant or petitioner has satisfied the standard of proof. *See U.S. v. Cardozo-Fonseca*, 480 U.S. 421, 431 (1987) (defining "more likely than not" as a greater than 50 percent probability of something occurring). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence, or if that doubt leads the director to believe that the claim is probably not true, to deny the application or petition.

At issue in this proceeding is whether the applicant has established continuous unlawful residence in the United States throughout the requisite period; whether he has established that he is admissible; and whether he has established that he is otherwise eligible to adjust to temporary resident status.

On appeal, counsel asserts that the applicant has established continuous unlawful residence throughout the requisite period and that he is otherwise eligible to adjust to temporary resident status. The documentation that the applicant submits in support of his claim to have arrived in the United States before January 1982 and resided in an unlawful status during the requisite period consists of numerous attestations from individuals claiming to know the applicant, copies of photographs, copies of the applicant's passport and a copy of the applicant's social security earnings statement. The AAO has reviewed each document to determine the applicant's eligibility; however, the AAO will not quote each witness statement in this decision.

The record contains numerous affidavits all containing statements that the affiants have known the applicant in the United States since 1981 and that they have knowledge of the applicant's residence in the United States during the requisite period. While the age of a few affiants in

1981, such as Manix Arcelona, cast doubt on the veracity of their ability to recall the applicant's exact date of entry, the majority of the affidavits contain sufficient information regarding the applicant's date of arrival in the United States and frequent meetings throughout the requisite period, which would reflect and corroborate the extent of those associations and demonstrate that they have a sufficient basis for reliable knowledge about the applicant's residence during the time addressed in the affidavits. On the whole, their content includes sufficient detail from a claimed relationship to indicate that the relationship probably did exist and that the affiant does, by virtue of that relationship, have knowledge of the facts alleged. Upon review, the AAO finds that, individually and together, the affidavits provide some probative value as evidence of the applicant's residence in the United States during the requisite period.

The record includes copies of photographs that are not independently verifiable by person, location or date. The photographs lack probative value and, therefore, will be given no weight as evidence of the applicant's residence in the United States during the requisite period.

The record contains a copy of the applicant's passport with a U.S. B1/B2 visa, issued on March 28, 1988. The applicant was admitted into the United States on March 29, 1988. The record includes a copy of the applicant's social security earnings statement that indicates he earned income in 1988. This evidence established the applicant's presence in the United States in 1988.

Although the applicant has established residence, he has not established continuous residence throughout the requisite period. Based on the applicant's own affidavit, he was absent from the United States from December 23, 1987, through March 29, 1988, a time period of 97 days. Pursuant to the regulation at 8 C.F.R. § 245a.15(c)(1), the applicant has exceeded the permitted forty-five (45) days in a single absence from the United States. The applicant has not submitted any evidence to establish that an emergent reason delayed his return to the United States. Therefore, his absence interrupted his residence in the United States.

Based upon the foregoing, the documents submitted in support of the applicant's claim have been found to have minimal probative value as evidence of the applicant's residence in the United States for the requisite period. However, the applicant's absence from the United States has interrupted his claim of continuous residence in the United States during the requisite period. Thus, the applicant has not established that he continuously resided in an unlawful status in the United States for the requisite period as required under both 8 C.F.R. § 245a.2(d)(5) and *Matter of E- M--, supra.*

Beyond the decision of the director, the applicant must establish that he is admissible to the United States and that he is otherwise eligible to adjust to temporary resident status. The applicant's testimony indicates that he willfully misrepresented himself as a lawful nonimmigrant upon entry in March 1988 even though his actual intent was to return to the United States to reside in this country indefinitely. The record reflects that he did this in order to gain a benefit under the Act. Namely, he sought to gain entrance into the United States. Thus, he is inadmissible under section 212(a)(6)(C)(i) of the Act. The applicant has not submitted to

the director the Form I-690, Application for Waiver of Grounds of Excludability, which is the form he must file to request a waiver of this ground of inadmissibility. Thus, he has not established that he is admissible or that he has requested a waiver of the ground of inadmissibility to which he is subject.

The applicant is, therefore, ineligible for temporary resident status under section 245A of the Act on this basis.

ORDER: The appeal is dismissed. This decision constitutes a final notice of ineligibility